

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 25, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP873

Cir. Ct. No. 2007CV629

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

AMERICAN BRIDGE MANUFACTURING COMPANY,

PLAINTIFF,

V.

PDM BRIDGE, LLC,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT,**

V.

**AMERICAN BRIDGE COMPANY/EDWARD KRAEMER & SONS, INC., A
JOINT VENTURE,**

THIRD-PARTY DEFENDANT-RESPONDENT,

AMERICAN BRIDGE COMPANY AND EDWARD KRAEMER & SONS, INC.,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Chippewa County:
RODERICK A. CAMERON, Judge. *Affirmed in part; reversed in part and cause
remanded for further proceedings.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. PDM Bridge, LLC, appeals from a judgment that ordered American Bridge Company/Edward Kraemer & Sons, Inc., a Joint Venture (the Joint Venture) to pay PDM \$586,921.35. PDM argues the circuit court erred by granting the Joint Venture's motion to stay a certain subset of the parties' claims in order to permit arbitration. We reject PDM's argument that the Joint Venture waived its right to arbitration, and we therefore affirm the court's decision to grant the stay.

¶2 In the alternative, PDM argues the circuit court erroneously denied PDM's motion to vacate the arbitration award. The court denied PDM's motion on jurisdictional grounds. PDM argues the jurisdictional grounds the court cited are no longer applicable, so we should remand for the court to address the motion's merits. However, the Joint Venture notes that a separate motion to confirm the arbitration award is currently pending in the Superior Court of the District of Columbia, and it argues that court is the appropriate forum for the postarbitration proceedings. It would be inappropriate for us to resolve the jurisdictional dispute between the circuit court and the Washington, D.C., court as a matter of first impression. We therefore conclude a remand is appropriate for the circuit court to determine: (1) whether, under the circumstances as they now exist, the circuit court has jurisdiction over PDM's motion to vacate; (2) if so, whether the court will exercise its jurisdiction and consider the motion's merits; and (3) if so, whether the motion should be granted.

¶3 PDM next argues it is entitled to attorney fees and costs under its contract with the Joint Venture. It also seeks an award of prejudgment interest. We reject PDM's arguments and affirm the circuit court's decision denying PDM's motion for attorney fees, costs, and prejudgment interest.

¶4 Finally, PDM challenges the circuit court's decision to toll the accrual of postjudgment interest pending the resolution of this appeal. We conclude the circuit court erred because its decision to toll postjudgment interest was based on cases from other jurisdictions, instead of Wisconsin law. We therefore reverse in part.

BACKGROUND

¶5 This case arises out of construction work on the Woodrow Wilson Bridge, which spans the Potomac River near Washington, D.C. The Joint Venture was hired as the general contractor for the project. It subcontracted with PDM to fabricate and deliver structural steel components for the bridge. PDM subcontracted with AGW Steel, Inc., to supply some of the steel. AGW, in turn, subcontracted a portion of its work to American Bridge Manufacturing Company (American Bridge). AGW was ultimately unable to perform the work required under its subcontract with PDM. PDM therefore took an assignment of the subcontract between AGW and American Bridge. That subcontract required that any lawsuit between the contracting parties be filed in Wisconsin.

¶6 Payment disputes arose between American Bridge and PDM, and between PDM and the Joint Venture during the course of the project. Consequently, on June 19, 2007, American Bridge sued PDM for breach of contract in Marathon County, Wisconsin. On October 15, the case was transferred to Chippewa County.

¶7 PDM subsequently filed a third-party complaint against the Joint Venture, consisting of four causes of action. The first cause of action sought a declaration that “if PDM is adjudged liable to [American Bridge] ... PDM is entitled to indemnity and/or contribution from [the Joint Venture].” The second cause of action alleged the Joint Venture breached its contract with PDM by failing to pay PDM in accordance with the contract’s terms. The third and fourth causes of action alleged the Joint Venture violated two Maryland statutes, which require that money paid to a general contractor specifically for a subcontractor’s work be held in trust for the subcontractor and not be used for any other purpose.

¶8 On November 26, 2007, the Joint Venture moved to dismiss PDM’s third-party complaint based on an arbitration provision in the parties’ contract. The circuit court denied the Joint Venture’s motion on March 11, 2008. The court observed there was a “commonality of management” between the Joint Venture and American Bridge. Consequently, the court concluded American Bridge’s act of suing PDM for damages “effectively waive[d]” the Joint Venture’s right to arbitrate PDM’s claims. In addition, because American Bridge’s and PDM’s claims were interrelated, the court reasoned there could be inconsistent results if PDM’s claims were submitted to arbitration but American Bridge’s claims remained in court.

¶9 The Joint Venture answered PDM’s third-party complaint on March 24, 2008, asserting as an affirmative defense that its contract with PDM required arbitration of all disputes. The Joint Venture also filed a counterclaim, alleging that PDM breached the parties’ contract by “misfabricating significant portions of the structural steel” and by “materially delay[ing] the project[.]” On April 10, the circuit court issued a scheduling order, which required that discovery

be completed by July 10, 2008, and dispositive motions be filed by August 11. A trial was scheduled to begin on November 3.

¶10 On April 17, 2008, PDM filed an amended third-party complaint, which added a fifth cause of action against the Joint Venture. The fifth cause of action, entitled “Breach of Contracts Because of Delay,” claimed that the Joint Venture’s “conduct, delays, and failures” breached the parties’ contract and caused PDM to incur “excessive damages” (delay claim). The Joint Venture answered the amended third-party complaint on May 7, again asserting as an affirmative defense that the parties’ contract required arbitration.

¶11 Three months later, on August 7, 2008, the Joint Venture moved the circuit court to stay proceedings on PDM’s delay claim to permit arbitration. PDM opposed the motion, arguing the Joint Venture waived its right to arbitrate the delay claim by actively litigating that claim in court. The circuit court concluded the Joint Venture had not waived its right to arbitration. The court also found that PDM’s delay claim was “separate from the other allegations” in the case, so there was “no realistic concern” that allowing arbitration would lead to inconsistent results. Accordingly, on October 21, 2008, the court entered a written order staying proceedings on PDM’s delay claim. The court also stayed proceedings on the Joint Venture’s delay claim against PDM.

¶12 A bench trial on the remaining claims began on November 3, 2008. However, on the first day of trial, American Bridge settled its claims against PDM, and the circuit court dismissed PDM’s fourth cause of action against the Joint Venture. The trial of the remaining claims lasted through November 7, 2008, and then resumed for two days during April 2009. The circuit court issued a memorandum decision on April 26, 2010, which concluded PDM was entitled to a

net award of \$549,888.65. After several adjustments, the court ultimately ordered the Joint Venture to pay PDM \$586,921.35.

¶13 While the Chippewa County litigation was ongoing, the Joint Venture filed a demand for arbitration of the parties' delay claims with the American Arbitration Association. The arbitration hearing took place in Washington, D.C., during June 2010. The arbitrators issued a final decision on October 4, 2010, which resulted in a net award of \$931,499.32 to the Joint Venture.

¶14 PDM moved the circuit court to vacate the arbitration award on November 4, 2010. On the same day, the Joint Venture filed a motion to confirm the award in the Circuit Court for Prince George's County, Maryland. PDM opposed the Joint Venture's motion. It admitted the Maryland court had jurisdiction to hear the motion, but it asked the Maryland court to stay its decision "pending a decision by the Wisconsin Court." In the alternative, PDM asked the Maryland court to vacate the award. The Maryland court summarily confirmed the award on January 24, 2011.

¶15 Back in Wisconsin, PDM argued the circuit court was required to vacate the arbitration award because the arbitrators exceeded their authority. In response, the Joint Venture contended the circuit court did not have jurisdiction to hear PDM's motion to vacate because, under WIS. STAT. § 788.10(1),¹ only a court "in and for the county wherein the award was made" can grant a motion to vacate. The Joint Venture also argued PDM's motion to vacate was moot because the

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Maryland court had already confirmed the award. The circuit court agreed with the Joint Venture's second argument, reasoning that "regardless of whether this court has jurisdiction, the matter has been resolved [by the Maryland court]." The court therefore denied PDM's motion to vacate.

¶16 PDM moved for reconsideration. PDM also filed a notice of appeal, but we stayed proceedings on the appeal pending the circuit court's decision on the motion for reconsideration. On June 20, 2011, the circuit court issued a "Decision on Final Motions After Judgment," which addressed PDM's reconsideration motion and several posttrial motions.

¶17 The June 20 decision contains several rulings relevant to this appeal. First, the court concluded it had "at least concurrent subject matter jurisdiction" over PDM's motion to vacate the arbitration award. However, the court decided the Maryland court was the "appropriate court to rule on the issues related to the arbitration" because "[the Joint Venture's] proceeding ... before the Maryland court was filed first[.]"² Second, the court found that PDM was not entitled to recover attorney fees and costs under the parties' contract, and it also declined to award prejudgment interest. Third, the court ruled that postjudgment interest should be tolled pending appeal. These rulings were incorporated into a Final Order and Amended Judgment, which was entered on August 12, 2011. PDM filed an amended notice of appeal from the August 12 judgment.

² The court acknowledged that the Joint Venture's motion to confirm in Maryland was actually filed the same day as PDM's motion to vacate. However, the court found that the Joint Venture's motion was filed several hours earlier.

¶18 Meanwhile, PDM appealed the Maryland court's order confirming the arbitration award. The Maryland Court of Special Appeals vacated the order on May 9, 2012, concluding the Circuit Court for Prince George's County did not have jurisdiction to confirm the award. Instead, the Court of Special Appeals stated "the Wisconsin Court had exclusive jurisdiction to confirm the arbitration award." The court further stated, "Assuming, *arguendo*, the Wisconsin Court does not have exclusive jurisdiction and it shares concurrent jurisdiction with the Maryland Court, the jurisdiction of the Wisconsin Court is senior to the Maryland Court's jurisdiction." The court therefore concluded the Circuit Court for Prince George's County should have, "at a minimum, abstained from ruling on [the] Joint Venture's complaint to confirm the arbitration award."

¶19 The Joint Venture subsequently filed a petition for writ of certiorari with Maryland's highest appellate court, the Maryland Court of Appeals. We stayed PDM's Wisconsin appeal pending final resolution of the Maryland proceedings. The Maryland Court of Appeals denied the Joint Venture's petition for writ of certiorari on July 9, 2012.

¶20 The Joint Venture then filed another motion to confirm the arbitration award, this time in the Superior Court of the District of Columbia. That action was stayed on December 6, 2012, "pending resolution of the Wisconsin litigation." The Superior Court reasoned that, if the Wisconsin Court of Appeals were to rule that the Joint Venture waived its right to arbitrate PDM's delay claim, that decision could "render the arbitration itself, and thus, any confirmation proceedings ... a nullity." Consequently, the Superior Court concluded it was "in the interests of judicial efficiency" to stay proceedings on the Joint Venture's motion to confirm.

DISCUSSION

I. The Joint Venture's motion to stay proceedings on PDM's delay claim

¶21 PDM first argues the circuit court erred by granting the Joint Venture's motion to stay proceedings on PDM's delay claim in order to permit arbitration. Specifically, PDM contends the Joint Venture waived its right to arbitrate the delay claim.³

¶22 Wisconsin law strongly favors arbitration as an alternative to litigation. *See, e.g., Franke v. Franke*, 2004 WI 8, ¶48, 268 Wis. 2d 360, 674 N.W.2d 832. However, "Wisconsin courts have recognized that there are circumstances where a party may be deemed to have waived arbitration." *Meyer v. Classified Ins. Corp. of Wis.*, 179 Wis. 2d 386, 392, 507 N.W.2d 149 (Ct. App. 1993); *see also* WIS. STAT. § 788.02 (court should not grant a stay to permit arbitration if the party seeking the stay is "in default in proceeding with such arbitration").

[A]ny conduct of the parties inconsistent with the notion that they treated the arbitration provision as in effect, or any conduct which might be reasonably construed as showing that they did not intend to avail themselves of such

³ Earlier in the lawsuit, the circuit court denied the Joint Venture's motion to stay proceedings and arbitrate PDM's other claims, reasoning there was a "commonality of management" between the Joint Venture and American Bridge, and American Bridge's act of suing PDM therefore waived the Joint Venture's right to arbitrate PDM's claims. The court subsequently concluded the Joint Venture had not waived its right to arbitrate PDM's delay claim. The court's decision staying proceedings on the delay claim did not address the commonality of management between the Joint Venture and American Bridge. On appeal, PDM does not raise the commonality of management as a basis for finding that the Joint Venture waived its right to arbitrate the delay claim. Because the issue is not properly before us, we decline to address whether American Bridge's act of suing PDM waived the Joint Venture's right to arbitrate the delay claim.

provision, may amount to a waiver thereof and estop the party charged with such conduct from claiming its benefits.

City of Madison v. Frank Lloyd Wright Found., 20 Wis. 2d 361, 387, 122 N.W.2d 409 (1963) (emphasis omitted) (quoting another source). Determining whether a party has waived its right to arbitrate requires an “overall evaluation of the [party’s] involvement and conduct up to the time” the party requested a stay. *Meyer*, 179 Wis. 2d at 397.

¶23 We ordinarily review a circuit court’s decision on waiver using a mixed standard of review—that is, we accept the circuit court’s findings of fact unless they are clearly erroneous, *see* WIS. STAT. § 805.17(2), but we independently review whether those facts meet the legal standard for waiver, *see Meyer*, 179 Wis. 2d at 396. Here, though, the facts relevant to the waiver analysis are basically undisputed. We therefore determine as a matter of law whether the Joint Venture waived its right to arbitrate. *See Jacob v. West Bend Mut. Ins. Co.*, 203 Wis. 2d 524, 540, 553 N.W.2d 800 (Ct. App. 1996).

¶24 It is undisputed that soon after it was served with PDM’s third-party complaint the Joint Venture moved to dismiss, arguing the parties’ contract required PDM to submit its claims to arbitration. After the circuit court denied the Joint Venture’s motion, the Joint Venture answered PDM’s third-party complaint, asserting as an affirmative defense that the parties’ contract required arbitration of PDM’s claims. Then, on April 17, 2008, PDM filed an amended third-party complaint that added a new cause of action for delay damages. The Joint Venture answered the amended third-party complaint on May 7, again asserting as an affirmative defense that the parties’ contract required arbitration. The Joint Venture moved to stay the litigation of PDM’s delay claim on August 7, 2008, and the circuit court granted its motion.

¶25 These facts do not support a conclusion that the Joint Venture waived its right to arbitrate PDM’s delay claim. Instead, the facts show that, from the time PDM filed its third-party complaint adding the Joint Venture as a party until the time the Joint Venture requested a stay, the Joint Venture repeatedly sought to have PDM’s claims submitted to arbitration. The Joint Venture clearly preserved its right to arbitration at every step of the proceedings. It consistently “treated the arbitration provision as in effect,” and its conduct cannot be “reasonably construed as showing that [it] did not intend to avail [itself] of such provision.” See *Frank Lloyd Wright Found.*, 20 Wis. 2d at 387 (emphasis omitted) (quoting another source).

¶26 PDM emphasizes that four months elapsed between the time PDM filed its amended third-party complaint and the time the Joint Venture requested a stay. However, PDM does not cite any authority supporting its argument that a four-month delay in moving to stay necessarily constitutes a waiver of the right to arbitrate. Moreover, PDM ignores the fact that, during the relevant four-month period, the Joint Venture filed an answer that asserted arbitration as an affirmative defense. Under these circumstances, we do not agree that the Joint Venture’s four-month delay in moving to stay amounted to a waiver of its right to arbitrate.⁴

⁴ PDM also notes that, by the time the Joint Venture moved to stay proceedings on the delay claim, “the case itself had been pending for over a year, and [the Joint Venture’s] own delay claims asserted in its original counterclaim had been pending for nearly that long.” We fail to see, and PDM does not explain, why these facts are relevant. The Joint Venture had been unsuccessful in its motion to dismiss PDM’s third-party complaint in favor of arbitration earlier. It could not have been expected to file another such motion on the filing of its counterclaim against PDM. Contrary to PDM’s assertion, the Joint Venture’s counterclaim against PDM had been pending for less than five months when the Joint Venture filed its motion to stay. Finally, the Joint Venture could not possibly have moved to stay proceedings on PDM’s delay claim before PDM asserted that claim.

¶27 PDM also argues the Joint Venture waived its right to arbitrate by engaging in “extensive” discovery and motion practice during the four months before it moved to stay. However, we have previously held that conducting discovery does not, in and of itself, waive a party’s right to arbitration. ***J.J. Andrews, Inc. v. Midland***, 164 Wis. 2d 215, 223-24, 474 N.W.2d 756 (Ct. App. 1991). “Matters undertaken before trial, including discovery, do not involve the same degree of time and expense[] that is required by a trial.” ***Id.*** at 224. Consequently, “[u]p to the point of trial, arbitration remains a viable alternative to litigation[,]” even though discovery has already taken place. *See id.*

¶28 Furthermore, PDM also ignores the fact that at least some of the discovery and motion practice the Joint Venture engaged in before moving to stay related to PDM’s other causes of action, instead of the delay claim. PDM also ignores the fact that, seven days before PDM filed its amended third-party complaint, the circuit court entered a scheduling order that required discovery to be completed in three months and dispositive motions to be filed in four months. Given these deadlines, the Joint Venture had little choice but to participate in discovery and motion practice. Engaging in discovery under these circumstances can hardly support a finding that the Joint Venture waived its right to arbitrate the delay claim, especially given that the Joint Venture repeatedly and consistently asserted its right to arbitration.

¶29 Based on the undisputed facts, and in light of Wisconsin’s strong policy favoring arbitration, we conclude the Joint Venture did not waive its right

to arbitrate PDM's delay claim. We therefore affirm the circuit court's decision to stay proceedings on the delay claim in order to permit arbitration.⁵

II. PDM's motion to vacate the arbitration award

¶30 PDM next argues the circuit court erred by denying its motion to vacate the arbitration award. The court denied the motion on jurisdictional grounds. It found that, although it had concurrent subject matter jurisdiction over the postarbitration proceedings, the Maryland court was the "appropriate court to rule on the issues related to the arbitration[.]" PDM argues the circuit court's jurisdictional basis for denying the motion to vacate is no longer valid because the Maryland judgment confirming the arbitration award has been vacated. PDM therefore asks us to reverse the order denying its motion to vacate and to remand for a decision on the merits. The Joint Venture argues we should not remand to the circuit court because the Superior Court of the District of Columbia is the proper forum for the parties' postarbitration disputes.

¶31 We decline to decide this issue. Both parties essentially ask us to determine whether the circuit court or the Superior Court of the District of Columbia is the appropriate forum for the postarbitration proceedings. However, neither the circuit court nor the Superior Court has yet had the opportunity to answer this question. For the reasons explained below, we therefore remand for the circuit court to determine, in the first instance, whether it has jurisdiction to

⁵ The Joint Venture argues PDM should be estopped from arguing that the circuit court erred by granting a stay to permit arbitration. Because we conclude the circuit court properly granted the stay, we need not address the Joint Venture's argument. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (appellate court need not address every issue raised when one is dispositive).

hear PDM's motion to vacate. If so, the court must determine whether it will exercise that jurisdiction. If so, the court must then consider the merits of PDM's motion.

¶32 PDM makes three alternative arguments as to why the circuit court has jurisdiction over PDM's motion to vacate and why the circuit court, rather than the Superior Court of the District of Columbia, is the proper forum for the postarbitration proceedings. Each of PDM's arguments is flawed.

¶33 PDM first notes the circuit court has already determined it has concurrent jurisdiction over the postarbitration proceedings. PDM argues the Joint Venture cannot challenge this ruling because it failed to file a notice of cross-appeal. However, as the Joint Venture points out, the issue of subject matter jurisdiction is nonwaivable and may be raised at any time. *See Moreland Corp. v. Retail Store Emp. Union Local No. 444, AFL-CIO*, 16 Wis. 2d 499, 502, 114 N.W.2d 876 (1962). In addition, while the circuit court determined it had concurrent jurisdiction under the facts that existed in June 2011, the circumstances have changed significantly since then. The Maryland judgment has been vacated, and a new motion to confirm has been filed in Washington, D.C. The circuit court has not had the chance to analyze the jurisdictional issue under these new circumstances. Thus, the court's earlier finding that it shared concurrent jurisdiction with the Circuit Court for Prince George's County, Maryland, is no longer conclusive.

¶34 Second, PDM argues we must give full faith and credit to the Maryland Court of Special Appeals' decision. *See* U.S. CONST. art IV, § 1 ("Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."). PDM argues the Court of Special Appeals'

decision conclusively established that the circuit court has either exclusive or senior concurrent jurisdiction over the postarbitration proceedings. We agree with PDM that the Court of Special Appeals' decision is entitled to full faith and credit. However, we do not agree that the decision conclusively established the circuit court has jurisdiction at the expense of the Superior Court of the District of Columbia.

¶35 The Maryland Court of Special Appeals was asked to determine whether the Circuit Court for Prince George's County, Maryland, had jurisdiction over the parties' postarbitration disputes. Accordingly, the Court of Special Appeals addressed two limited issues:

1. Whether the [Circuit Court for Prince George's County] erred by assuming jurisdiction over [the] Joint Venture's complaint to confirm an arbitration award after arbitration was ordered by a Wisconsin Court.
2. Whether the [Circuit Court for Prince George's County] erred by failing to abstain from ruling on [the] Joint Venture's complaint to confirm an arbitration award in deference to a Wisconsin Court's senior jurisdiction over the dispute between the parties.

The Court of Special Appeals was never asked to determine whether the circuit court had jurisdiction over the postarbitration proceedings. The court's findings that the circuit court had exclusive or senior concurrent jurisdiction were therefore not essential to its ultimate holding. Thus, we decline to read the Court of Special Appeals' decision as conclusively establishing that the circuit court has jurisdiction over the parties' postarbitration disputes.

¶36 In addition, the Maryland Court of Special Appeals was never asked to determine whether the Superior Court of the District of Columbia had jurisdiction over the postarbitration proceedings. Thus, even though the Court of

Special Appeals stated the circuit court had “exclusive jurisdiction,” it did not actually decide whether the circuit court had jurisdiction to the exclusion of the Superior Court. Furthermore, the Court of Special Appeals had no authority to prospectively preclude the Superior Court from determining its own jurisdiction to confirm the award. “It is an invariable and universal feature of our judicial institutions that every court must be the judge of its own jurisdiction in the first instance, and [cannot] be concluded by what any other tribunal, except of course an appellate tribunal, has said or done in the matter.” *Overby v. Gordon*, 13 App. D.C. 392, 413 (D.C. Cir. 1898), *aff’d*, 177 U.S. 214 (1900). We therefore conclude that, although the Court of Special Appeals’ decision is entitled to full faith and credit, that decision did not actually decide the jurisdictional dispute that now exists between the circuit court and the Superior Court of the District of Columbia.

¶37 Third, PDM argues the record demonstrates that the circuit court has exclusive jurisdiction over the postarbitration proceedings. As a result, PDM contends the Superior Court of the District of Columbia cannot have jurisdiction. Whether a court has subject matter jurisdiction under a given set of facts is a question of law that we review independently. *Van Deurzen v. Yamaha Motor Corp. USA*, 2004 WI App 194, ¶9, 276 Wis. 2d 815, 688 N.W.2d 777. Here, the facts do not establish that the circuit court has exclusive jurisdiction.

¶38 In its order granting the Joint Venture’s motion to stay proceedings on the delay claims, the circuit court stated the Joint Venture “ha[d] a right to such relief under [WIS. STAT.] § 788.02.” PDM argues that, when a court grants a stay to permit arbitration under § 788.02, the court reserves jurisdiction over the parties’ dispute. PDM cites several cases that distinguish between situations where a court grants a stay to permit arbitration and situations where the parties

voluntarily decide to dismiss a lawsuit in order to arbitrate their disputes. *See, e.g., Pick Indus., Inc. v. Gebhard-Berghammer, Inc.*, 262 Wis. 498, 503, 56 N.W.2d 97 (1953). PDM argues the court retains jurisdiction in the former situations, but not in the latter. However, it does not necessarily follow that a circuit court retains *exclusive* jurisdiction over postarbitration proceedings when it grants a motion to stay. PDM does not cite any legal authority for its position that the circuit court retains exclusive, rather than concurrent, jurisdiction. WISCONSIN STAT. § 788.02 does not compel that result. Thus, although the circuit court may have retained jurisdiction over the postarbitration proceedings when it granted the Joint Venture’s motion to stay, PDM has not established that its jurisdiction was exclusive.

¶39 None of PDM’s appellate arguments compels us to conclude the circuit court has jurisdiction over the postarbitration proceedings to the exclusion of the Superior Court of the District of Columbia. We therefore turn to the Joint Venture’s argument that the Superior Court is the proper forum to decide the parties’ postarbitration disputes. In support of its position, the Joint Venture argues:

- The American Arbitration Association ruled that Washington, D.C., was the appropriate venue for the arbitration.
- The arbitration took place in Washington, D.C., and the award was made there.
- A portion of the underlying construction project is located in Washington, D.C.
- The Joint Venture moved to confirm the arbitration award in the Superior Court of the District of Columbia.
- The Superior Court has jurisdiction to confirm the arbitration award under D.C. CODE § 16-4426(b) (“An agreement to arbitrate providing for

arbitration in the District of Columbia confers exclusive jurisdiction on the court to enter judgment on an award under this chapter.”).

- The Superior Court acknowledged its jurisdiction when it stayed proceedings on the Joint Venture’s motion to confirm pending the resolution of this appeal, rather than dismissing the motion outright.
- The circuit court lacks jurisdiction to vacate the award, pursuant to WIS. STAT. § 788.10(1).
- The interests of judicial efficiency weigh against remanding the case to the circuit court because PDM has acknowledged that, if the case is remanded, it will argue the Joint Venture is time barred from filing a motion to confirm in Wisconsin. Thus, a remand will “result in litigation of that position and further delay the confirmation of a valid arbitration award that is more than two years old.”

¶40 Some of the Joint Venture’s arguments appear to have possible merit. However, as noted above, neither the circuit court nor the Superior Court has had the opportunity to address the jurisdictional dispute between them. While the circuit court previously concluded it had concurrent jurisdiction with the Maryland court, it never addressed its jurisdiction vis-à-vis that of the Superior Court. Similarly, although the Superior Court granted a stay of proceedings on the Joint Venture’s motion to confirm pending this court’s decision, it never actually determined whether it had jurisdiction to hear the Joint Venture’s motion. This court is not the appropriate forum to decide the jurisdictional dispute between the circuit court and the Superior Court as a matter of first impression. We therefore remand the case to the circuit court for further proceedings.

¶41 Specifically, the circuit court must determine whether, under the present circumstances, it has jurisdiction over PDM’s motion to vacate. If so, the court must determine whether it will exercise its jurisdiction to hear PDM’s motion, or if it will instead defer to the Superior Court of the District of Columbia.

If the circuit court decides to exercise its jurisdiction, it must then consider the merits of PDM's motion.

III. Attorney fees, costs, and prejudgment interest

¶42 PDM next argues it is entitled to attorney fees and costs under its contract with the Joint Venture. Contract interpretation presents a question of law that we review independently. *BV/BI, LLC v. InvestorsBank*, 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622. If contract terms are unambiguous, we simply construe the contract as it stands. *Id.* However, if we determine a contract provision is ambiguous, we look to extrinsic evidence to determine the contract's meaning. *Id.* "A contract is ambiguous when its terms are reasonably susceptible to more than one interpretation." *Id.*

¶43 Article 5.2 of the parties' contract provides:

Should Contractor's [the Joint Venture's] failure to make payment continue uncured for more than thirty (30) calendar days, Supplier [PDM] may, at its option, deem contractor's failure to be a material breach of contract, which shall entitle Supplier to terminate this agreement for default. Under such circumstances, Supplier shall be entitled to be paid for the value of the work it has completed to date, including stored materials and work in progress. In addition, subject to a maximum cap of one million dollars (\$1,000,000), Supplier shall be entitled to: its anticipated profit and overhead expense on the entire contract; its plant utilization costs and expenses; and, its appurtenant costs and expenses, including consulting and actual attorney's fees.

The circuit court found that, under this provision, PDM could only recover attorney fees from the Joint Venture if PDM terminated the contract. We agree with the circuit court's interpretation. Article 5.2 clearly states that if the Joint Venture fails to pay PDM within thirty days of the due date, PDM may deem that

failure a material breach of contract and may opt to “terminate this agreement for default[.]” “*Under such circumstances,*” PDM is entitled to recover certain damages, including attorney fees. (Emphasis added.) The only reasonable interpretation of the phrase “under such circumstances” is that it refers to the circumstances described in the preceding sentence—that is, circumstances in which PDM deems the Joint Venture’s failure to pay a material breach and therefore terminates the contract. Thus, under article 5.2’s plain language, PDM must terminate the contract in order to recover attorney fees.

¶44 PDM argues termination of the contract is not required because article 5.2 states that PDM may recover attorney fees “in addition” to the other remedies listed. We agree that the contract allows PDM to recover attorney fees in addition to the other remedies listed in article 5.2. However, termination of the contract is a precondition to recovering any of those remedies. This distinguishes the remedies listed in article 5.2, which requires termination of the contract, from the remedies listed in articles 5.1 and 5.3, which do not require termination.⁶

¶45 The circuit court found that PDM did not terminate its contract with the Joint Venture. PDM does not challenge that finding on appeal. Consequently, PDM is not entitled to recover attorney fees and costs under article 5.2.

¶46 PDM also argues the circuit court erred by failing to award prejudgment interest. Whether to award prejudgment interest is a question of law that we review independently. *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695,

⁶ Article 5.1 allows PDM to suspend work under the contract if the Joint Venture is over fifteen days late in making a payment. Article 5.3 provides for the accrual of interest on late payments.

706, 445 N.W.2d 717 (Ct. App. 1989). Prejudgment interest is available “when damages are fixed and determinable or may be measured according to a reasonably certain standard.” *Id.*⁷

¶47 PDM contends that at least \$106,509.90 of its damages were fixed and determinable because, before judgment was entered, the Joint Venture conceded certain change orders entitled PDM to that amount. PDM argues it is entitled to prejudgment interest on the balance of the award because “the net award to PDM resulted largely from the circuit court’s conclusion that PDM was entitled to \$979,902 for Change Order A and \$325,802.05 for change orders initiated by the State of Maryland[.]” PDM asserts, “The record demonstrates that neither of these amounts were actually in dispute.”

¶48 We reject PDM’s contention that it is entitled to prejudgment interest. The circuit court awarded PDM damages based on pending change orders, some of which were undisputed. However, to determine the final amount PDM was entitled to recover, the court had to subtract certain back charges—that is, damages owed to the Joint Venture for the cost of replacing PDM’s defective work. The circuit court’s April 26, 2010 memorandum decision, devoted nearly twenty pages to assessing individual items of damages. The court also attached a computation showing how it arrived at the net award in favor of PDM. Until the

⁷ PDM cites article 5.3 of its contract with the Joint Venture, which states, “Interest shall accrue on late payments, commencing upon the date payment is due, and continuing until payment is made[.]” However, PDM does not develop an argument that it is entitled to interest under article 5.3. Instead, PDM cites *Loehrke v. Wanta Builders, Inc.*, 151 Wis. 2d 695, 706, 445 N.W.2d 717 (Ct. App. 1989), and argues it is entitled to prejudgment interest because its damages were fixed and determinable. We will not abandon our neutrality to develop an argument for PDM based on article 5.3 of the contract. See *Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82.

court completed this computation, there was no way to know which party would receive a net award. Thus, even though certain items of damages may have been fixed or determinable, the Joint Venture had no way of knowing how much it actually owed PDM until the parties' various claims were resolved. "[P]rejudgment interest will not be granted where the damages are determinable but 'some other factor' prevents the party from determining the amount that should be tendered." *City of Merrill v. Wenzel Bros.*, 88 Wis. 2d 676, 697, 277 N.W.2d 799 (1979). Here, uncertainty about the amount of the back charges was "some other factor" preventing the Joint Venture from determining the amount that should be tendered.

IV. Postjudgment interest

¶49 Lastly, PDM argues the circuit court erred by granting the Joint Venture's request to toll the accrual of postjudgment interest pending the resolution of this appeal. The circuit court based its decision on cases from other jurisdictions, which hold that a party who unsuccessfully appeals from a judgment in his or her favor is not entitled to interest on the judgment pending appeal. *See, e.g., Quality Molding Co. v. American Nat'l Fire Ins. Co.*, 287 F.2d 313, 314-15 (7th Cir. 1961) (applying Illinois law); *Arley v. Liberty Mut. Fire Ins. Co.*, 404 P.2d 426, 428 (Nev. 1965). We conclude the circuit court erred for two reasons.

¶50 First, the cases the circuit court relied on preclude the recovery of postjudgment interest only when the judgment creditor is unsuccessful on appeal. When the circuit court tolled the accrual of postjudgment interest in this case, it was not yet clear whether PDM would be successful on appeal. Thus, the circuit court's ruling was, at a minimum, premature.

¶51 Second, the circuit court erred by relying on foreign authority rather than Wisconsin law. In Wisconsin, postjudgment interest is governed by WIS. STAT. §§ 814.04(4) and 815.05(8). Interpretation of these statutes presents a question of law that we review independently. *See Teschendorf v. State Farm Ins. Cos.*, 2006 WI 89, ¶9, 293 Wis. 2d 123, 717 N.W.2d 258. Statutory interpretation “begins with the language of the statute. If the meaning of the statute is plain, we ordinarily stop the inquiry.” *Seider v. O’Connell*, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659.

¶52 WISCONSIN STAT. § 814.04(4) provides that interest “from the time of verdict, decision, or report until judgment is entered *shall* be computed by the clerk and added to the costs.” (Emphasis added.) WISCONSIN STAT. § 815.05(8) states that “every execution upon a judgment for the recovery of money *shall* direct the collection of interest ... on the amount recovered from the date of the entry of the judgment until it is paid.” (Emphasis added.) “The general rule in interpreting statutory language is that ‘the word ‘shall’ is presumed mandatory when it appears in a statute.’” *GMAC Mortg. Corp. v. Gisvold*, 215 Wis. 2d 459, 477, 572 N.W.2d 466 (1998) (quoting *Karow v. Milwaukee Cnty. Civil Serv. Comm’n*, 82 Wis. 2d 565, 570, 263 N.W.2d 214 (1978)). Thus, under the plain language of §§ 814.04(4) and 815.05(8), recovery of postjudgment interest is mandatory. The statutes make no exception for cases where a party unsuccessfully appeals a favorable judgment.

¶53 Postjudgment interest may be tolled, however, if the court stays execution of the judgment pending appeal. *See Estate of Matteson v. Matteson*, 2008 WI 48, ¶79, 309 Wis. 2d 311, 749 N.W.2d 557; *see also* WIS. STAT. § 808.07 (“Relief pending appeal.”). Whether a stay of execution should be granted is within the circuit court’s discretion. *Matteson*, 309 Wis. 2d 311, ¶79. To properly

exercise its discretion, the court should consider: (1) the appellant's likelihood of success on appeal; (2) the need to ensure the collectability of the judgment; (3) the interest of the appellant in securing the fruits of the appeal if it is ultimately successful; and (4) the harm to the respondent that may result if the judgment is not paid until the completion of an unsuccessful appeal. *Scullion v. Wisconsin Power & Light Co.*, 2000 WI App 120, ¶¶18-22, 237 Wis. 2d 498, 614 N.W.2d 565. Once a stay of execution is granted, a party may stop the accrual of postjudgment interest by paying the full amount of the judgment to the clerk of court. *Matteson*, 309 Wis. 2d 311, ¶¶81, 85; *Downey, Inc. v. Bradley Ctr. Corp.*, 188 Wis. 2d 435, 449, 524 N.W.2d 915 (Ct. App. 1994).

¶54 No party filed a motion to stay execution of the judgment in the circuit court pending appeal. Therefore the court did not consider whether a stay of execution was appropriate under the four factors articulated in *Scullion*. The opportunity for the court to consider whether a stay was appropriate and for the Joint Venture to stop the accrual of postjudgment interest by paying the full amount of the judgment to the clerk of court has passed. As discussed above, recovery of postjudgment interest is mandatory. We therefore reverse the court's decision to toll the accrual of interest.

¶55 No WIS. STAT. RULE 809.25 costs allowed to either party.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded for further proceedings.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

